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No. 99-1178

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CARGILL, INCORPORATED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Cargill, Incorporated ("Cargill") respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioner and Respondent U.S. Army Corps of Engineers ("Corps"). Consent was withheld by Intervenor-Respondent City of Bartlett.

Cargill, besides its holdings in other states, is the successor of Leslie Salt Co. and, as such, is the largest private landowner in the San Francisco Bay Area, owning some 17,000 acres and holding a perpetual right for salt-making and related uses over an additional 12,000 acres. On much of the acreage, Cargill is engaged in salt-making by the process of solar evaporation and precipitation. Portions of Cargill's acreage, after having been used in the industrial salt-making operation for many years, were decommissioned a number of years ago. Other areas remain in active use as an industrial concern.

Because of the Corps' aggressive assertion of Clean Water Act ("CWA") jurisdiction over its lands, purportedly under the authority of the "migratory bird rule," Cargill has in the past sought to challenge the "rule" in this Court. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In addition, because operations on its lands are, and may be, affected by other federal environmental laws, Cargill has participated as amicus curiae before this Court concerning the validity of expansive agency interpretations of such laws. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995).

Cargill's perspective and litigation experience in dealing with the issues presented in this case will provide a unique

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

viewpoint that will aid the Court in evaluating the merits of the Petition.

Disputes between the Corps, various environmental groups, and Cargill and its predecessor Leslie Salt Co., concerning the extent of CWA jurisdiction over Cargill's property span more than 25 years. Initially, the focus was upon the interrelationship between the CWA Amendments of 1972 (33 U.S.C. §§ 1311(a), 1344(a), 1362(12) and 1362(7)) and the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, *et seq.*) under which the Corps had historically exercised regulatory authority over navigable waters of the United States. *See Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). However, with the creation of the "migratory bird rule" in 1986 by the Corps and the U.S. Environmental Protection Agency ("EPA"), ignore the focus changed. No longer was the concern about the status of true waters on Cargill's lands, but whether manmade facilities no longer used for solar salt production—neither part of nor adjacent to navigable waters, and possessed of no hydrologic connection (surface or otherwise) to any navigable water—could be subject to jurisdiction under section 404 of the CWA solely based on their use or potential use by migratory birds. Assertions of regulatory jurisdiction on this ground over certain portions of Cargill's lands led to two decisions of the Ninth Circuit Court of Appeals,[2] relied upon heavily by the Seventh Circuit here, together with two petitions for certiorari to the Court[3] and a number of district court decisions.[4]

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[2] *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (*"Leslie I"*); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) (*"Leslie II"*).

[3] *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

[4] *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987); *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1988); *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992).

Following the conclusion of the *Leslie Salt* litigation, a further assertion of jurisdiction under the "migratory bird rule" by two environmental groups led to a radical expansion of the reach of the rule. *San Francisco BayKeeper v. Cargill Salt Division*, No. C96-02161 CAL (N.D. Cal., Apr. 15, 1999). The district court's decision is now on appeal before the Court of Appeals for the Ninth Circuit (Case No. 99-16032).

The district court in the original *Leslie Salt Co.* proceeding found that the periodic collections of rainwater were so temporary and ephemeral that they did not constitute a waterbody, much less a "water of the United States" that could be subject to the CWA. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-486 (N.D. Cal. 1988). Its decision in favor of Leslie Salt was reversed on appeal in *Leslie I* in a divided opinion. 896 F.2d at 354. After concluding that the temporary nature of the ponded rainfall was not an impediment to CWA jurisdiction, the panel majority—in one sentence, without analysis—sustained the "migratory bird rule" on the theory that "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360.

Following remand to determine the extent of temporary ponding and migratory bird use, Leslie Salt again appealed to the Ninth Circuit. On the second appeal, a differently constituted panel of the Ninth Circuit affirmed on the basis that, in the panel's view, it could not reconsider the prior decision, even if persuaded the decision was wrong, so long as it was not "clearly wrong." *Leslie II*, 55 F.3d at 1393. Following this unusual standard for questions of law, the court addressed whether application of the "migratory bird rule" to very shallow, non-navigable seasonal ponds wholly unconnected to any other waterbody was authorized by the CWA. The court found that "Cargill's arguments might well deserve closer consideration" if the issue were being presented to it for the first time. *Leslie II*, 55 F.3d at 1395. However,

since the court concluded that the initial panel's earlier decision was not "clearly erroneous," it did not reconsider the question. *Id.* Nonetheless, the court acknowledged that the "migratory bird rule" "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie II*, 55 F.3d at 1396.

Cargill, as successor to Leslie Salt Co., petitioned this Court for a writ of certiorari following the Ninth Circuit's *Leslie II* decision. In dissenting from denial of the writ, Justice Thomas argued that *United States v. Lopez*, 514 U.S. 549 (1995), reaffirmed the well-accepted doctrine that the activity to be regulated must *substantially* affect interstate commerce before Congress can regulate it pursuant to the Commerce Clause. *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995). He observed that no such showing had been made to support application of the "migratory bird rule" to Cargill's property. *Id.*

In 1996, on the strength of *Leslie I* and *Leslie II*, San Francisco BayKeeper and Citizens Committee to Complete the Refuge sued Cargill for violations of the CWA on the theory that rainwater that periodically fell on saline brine within an isolated, self-contained waste treatment facility,[5] transformed that portion of the facility covered with brine into a "water of the United States" because it was occasionally used by migratory birds. The same district judge that heard *Leslie I* and *Leslie II* felt compelled by the Ninth Circuit's two opinions to rule in plaintiffs' favor, in the process admitting the unreasonableness of the result.[6] *San Francisco BayKeeper*

[5] Cargill maintains that the site in question is a "waste treatment system" and, therefore, is not a water of the United States under the CWA. 40 C.F.R. § 122.2. This issue is presently before the Ninth Circuit in Cargill's appeal.

[6] "So I believe that the requirements of the regulation are satisfied; that the jurisdictional requirements of being a water of the United States, both under the regulations and under the two Ninth Circuit cases, does satisfy the requirements of being a water of the United States. [¶] That may not be terribly practical. When we have an industrial facility obviously moving around water, moving around salts, producing salt, big wide flat areas obviously with some depressions in them where water can collect or where

v. Cargill Salt Division, No. C96-02161 CAL (N. D. Cal., Apr. 15, 1999). In its pending appeal to the Ninth Circuit, Cargill is challenging the district court's expansion of the reach of the Leslie Salt decisions and the "migratory bird rule" on many of the same grounds asserted by Petitioners here.[7]

Given Cargill's previous CWA jurisdictional disputes with the Corps, the pending BayKeeper litigation now before the Ninth Circuit and the fact that Cargill continues to operate some 29,000 acres—much of which is potentially subject to the claim of migratory bird jurisdiction—it is plain that Cargill has a real interest in the outcome of this case. Cargill's special position will bring to bear a fresh perspective that will be helpful to the Court's resolution of the issue.

For the reasons stated above, Cargill respectfully requests that this Court GRANT its motion for leave to file this brief.

DATED: March 2000

Respectfully submitted,

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they've been leveed off for one purpose or another, it doesn't make any practical sense to say, 'Well, we'll take a small area of this and water gets in it, so we define it as a water of the United States.' [¶] Maybe it doesn't, but I have to be governed by the definitions of the Ninth Circuit and the definitions of the regulations, and I think this battle got fought out at least four times in the *Leslie Salt* litigation and that's twice before me and twice before the Ninth Circuit." Tr. of Jan. 26, 1998 hrg. at 34-35 (No. C96-02161 CAL).

[7] Cargill maintains that subjecting the area covered by liquid brine within Cargill's waste treatment facility to CWA jurisdiction on the ground that the brine has been converted into a water of the United States by virtue of its use by migratory birds has pushed the reach of the CWA migratory bird rule well beyond the earlier *Leslie Salt* decisions. The saline brines contained within Cargill's waste treatment facility are, of course, themselves pollutants under the CWA.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE i

TABLE OF AUTHORITIES vii

INTEREST OF THE AMICUS 1

ARGUMENT 2

A. THE MIGRATORY BIRD RULE'S EXTENSION OF REGULATORY JURISDICTION IS INCONSISTENT WITH ANY REASONABLE CONSTRUCTION OF THE CLEAN WATER ACT. 2

1. The Statutory Text 3

2. Legislative History 5

3. Administrative Construction 7

B. THE MIGRATORY BIRD RULE EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE 10

C. THE MIGRATORY BIRD RULE IS UNCONSTITUTIONAL AS RESULTING FROM AN EXCESSIVE DELEGATION OF LEGISLATIVE POWER 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

American Trucking Association, Inc. v. EPA,
175 F.3d 1027 (D.C. Cir. 1999), *order on reh'g* 195 F.3d 4 (D.C. Cir. 1999) 15

Andrus v. Allard,
444 U.S. 51 (1979) 12, 13

Andrus v. Sierra Club,
442 U.S. 347 (1979) 10

Arizona Electric Power Co-Op, Inc. v. United States,
816 F.2d 1366 (9th Cir. 1987) 8

Ayala-Chavez v. INS,
945 F.2d 288 (9th Cir. 1991) 17

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,
515 U.S. 687 (1995) i

Bowen v. American Hosp. Ass'n,
476 U.S. 610 (1986) 8

Bowen v. Georgetown University Hosp.,
488 U.S. 204 (1988) 8

Cargill, Inc. v. United States,
516 U.S. 955 (1995) ..... i, ii, iv, 14

Chevron USA v. NRDC,
467 U.S. 837 (1984) 8

Dole v. United Steelworkers,
494 U.S. 26 (1990) 8

Douglas v. Seacoast Products, Inc.,
431 U.S. 265 (1977) 13

Economy Light & Power Co. v. United States,
256 U.S. 113 (1921) 6

ETSI Pipeline Project v. Missouri,
484 U.S. 495 (1988) 8

Federal Power Comm'n v. Union Electric Co.,
381 U.S. 90 (1965) 4
Flores v. Meese,
942 F.2d 1352 (9th Cir. 1991) 17
Greene v. McElroy,
360 U.S. 474 (1959) 17
Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 16
Hodel v. Virginia Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 11, 16
Hughes v. Oklahoma,
441 U.S. 322 (1979) 12, 13
INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 8
Katzenbach v. McClung,
379 U.S. 294 (1964) 16
Leslie Salt Co. v. Froehlke,
403 F. Supp. 1292 (N.D. Cal. 1974) ii
Leslie Salt Co. v. Froehlke,
578 F.2d 742 (9th Cir. 1978) ..... ii, 6
Leslie Salt Co. v. United States,
498 U.S. 1126 (1991) ..... i, ii
Leslie Salt Co. v. United States,
55 F.3d 1388 (9th Cir. 1995) (*"Leslie II"*) ..... ii, iii, iv
Leslie Salt Co. v. United States,
660 F. Supp. 183 (N.D. Cal. 1987) ii
Leslie Salt Co. v. United States,
700 F. Supp. 476 (N.D. Cal. 1988) iii
Leslie Salt Co. v. United States,
820 F. Supp. 478 (N.D. Cal. 1992) ii
Leslie Salt Co. v. United States,
896 F.2d 354 (9th Cir. 1990) (*"Leslie I"*) ..... ii, iii

Lorillard v. Pons,
434 U.S. 575 (1978) 10
Maine v. Taylor,
477 U.S. 131 (1986) 12
Martin v. Refrigeration School,
968 F.2d 3 (9th Cir. 1992) 8
Maryland v. Wirtz,
392 U.S. 183 (1968) 11
Metro Broadcasting v. FCC,
497 U.S. 547 (1990) 16
Missouri v. Holland,
252 U.S. 416 (1920) 13
National Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) 12
NRDC v. Callaway,
392 F. Supp. 685 (D.D.C. 1975) 9
Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,
313 U.S. 508 (1941) 7
Polish National Alliance v. NLRB,
322 U.S. 643 (1944) 4
Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 10
San Francisco BayKeeper v. Cargill Salt Division,
No. C96-02161 CAL (N.D. Cal., Apr. 15, 1999) ..... iii, iv
Schechter v. United States,
295 U.S. 495 (1935) 15
Sierra Club v. Leslie Salt Co.,
412 F. Supp. 1096 (N.D. Cal. 1976) ii
Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,
191 F.3d 845 (7th Cir. 1999) 2
Sullivan v. Zebley,
493 U.S. 521 (1990) 8

Tabb Lakes, Ltd. v. United States,
715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d
866 (4th Cir. 1989).....2, 10, 15
United States v. Appalachian Electric Power Co.,
311 U.S. 377 (1940).....7
United States v. Leslie Salt Co.,
350 U.S. 383 (1956).....8
United States v. Lexington Mill & Elevator Co.,
232 U.S. 399 (1914).....4
United States v. Lopez,
514 U.S. 549 (1995).....iv, 11, 12
United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899).....5
United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985).....3, 6, 9, 13
United States v. Security Industrial Bank,
459 U.S. 70 (1982).....10
United States v. Wilson,
133 F.3d 251 (4th Cir. 1997).....2, 10
Watt v. Alaska,
451 U.S. 259 (1981).....8

Statutes, Rules and Regulations

33 C.F.R. § 328.3(a)(3).....3, 10
33 U.S.C. § 1311.....3
33 U.S.C. § 1311(a).....ii
33 U.S.C. § 1342.....3
33 U.S.C. § 1344.....3
33 U.S.C. § 1344(a).....ii
33 U.S.C. § 1362(12).....ii
33 U.S.C. § 1362(7).....ii, 3
33 U.S.C. §§ 401, *et seq.*.....ii
40 C.F.R. § 122.2.....iv

5 U.S.C. § 553.....16
Act of Feb. 19, 1895 § 2,
33 U.S.C. § 151.....3
Act of June 22, 1936 § 1,
33 U.S.C. § 701(a).....4
Act of June 29, 1888 § 1,
33 U.S.C. § 441.....5
Act of Sept. 15, 1922,
33 U.S.C. § 472.....4
Bear River Migratory Bird Refuge Act of Apr. 23,
1928,
ch. 413, 45 Stat. 448, 16 U.S.C. § 690, *et seq.*.....8
Cheyenne Bottoms Migratory Bird Refuge Act of
June 12, 1930,
ch. 469, 46 Stat. 579, 16 U.S.C. § 691, *et seq.*.....9
Emergency Wetlands Resources Act of Nov. 10, 1986,
Pub. L. 99-645, 100 Stat. 3582, 16 U.S.C. § 3901, *et*
seq......9
Endangered Species Act of Dec. 28, 1973,
Pub. L. 93-205, 87 Stat. 884, 16 U.S.C. § 1531, *et*
seq......9
Federal Power Act § 23(b),
16 U.S.C. § 817.....4
Migratory Bird Conservation Act of Feb. 18, 1929,
ch. 3657, 45 Stat. 1222, 16 U.S.C. § 715, *et seq*.....8
Migratory Bird Hunting Stamp Act Amendments of
Aug. 1, 1958,
Pub. L. 85-585, 72 Stat. 486, 16 U.S.C. § 718(b) &
(c).....9
Migratory Bird Hunting Stamp Act of Mar. 16, 1934,
ch. 71, 48 Stat. 451, 16 U.S.C. § 718, *et seq.*.....9
Migratory Bird Treaty Act of July 3, 1918,
ch. 128, 40 Stat. 755, 16 U.S.C. § 703, *et seq*.....8, 13

Migratory Waterfowl & Other Wildlife Refuge in Cal. Act of May 18, 1948, ch. 303, 62 Stat. 238, 16 U.S.C. § 695, *et seq.* 9
Pub. L. 85-500, § 104, 33 U.S.C. § 610.....5
Rivers & Harbors Act of 1894 § 5, 33 U.S.C. § 499.....3
Rivers & Harbors Act of 1899 § 10, 33 U.S.C. § 403.....4
Rivers & Harbors Act of 1899 § 13, 33 U.S.C. § 407.....5
Wetlands Act of Oct. 4, 1961, Pub. L. 87-383, 75 Stat. 813, 165 U.S.C. § 7152k-3, *et seq.* 9
Wetlands Loan Extension Act of Feb. 17, 1976, Pub. L. 94-215, 90 Stat. 189, 16 U.S.C. § 715 9

Administrative Materials

40 Fed. Reg. 31320, *et seq.* (1975) 9
51 Fed. Reg. 41217 (1986) 11

Legislative Materials

"Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation," 94th Cong., 1st Sess. 29 (1975).....9
"Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environmental Public Works," 99th Cong. 1st Sess. 168 (1985).....9

118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie) 6
118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).....6
S. Conf. Rep. 1236, 92nd Cong. 2d Sess. 144 (1972) 6

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BRIEF OF AMICUS CURIAE CARGILL, INCORPORATED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Cargill, Incorporated ("Cargill") respectfully submits this brief as amicus curiae supporting the granting of Solid Waste Agency of Northern Cook County's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICUS

The interest of Cargill is set forth in the preceding motion.

ARGUMENT

A. THE MIGRATORY BIRD RULE'S EXTENSION OF REGULATORY JURISDICTION IS INCONSISTENT WITH ANY REASONABLE CONSTRUCTION OF THE CLEAN WATER ACT.

The Seventh Circuit below, relying upon the Ninth Circuit's *Leslie I* decision, concluded that CWA reaches "as many waters as the Commerce Clause allows." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999). The Seventh Circuit opined that "if Congress possesses the power to regulate a body of water under the Act, generally this court will conclude that it has in fact done so." *Id.* at 851. Based upon this dubious proposition, the court held regulation of waters based on the presence of migratory birds is authorized by the CWA. *Id.* at 853. This conclusion, we submit, is directly in conflict with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). That court invalidated the entirety of the regulation the "migratory bird rule" is said to interpret on the ground it is unauthorized by the CWA in that it purports to regulate wholly intrastate non-navigable waters if the degradation of those waters could affect interstate commerce. *Id.* at 257. Indeed, Fourth Circuit expressed considerable doubt as to whether Congress itself could expressly extend its reach over such areas under the Commerce Clause, but did not reach that question because it concluded that the CWA does not authorize such an expansion. *Id.*

Wilson is the Fourth Circuit's most recent rejection of the "migratory bird rule." In 1989, that court had found the rule wanting as violative of the Administrative Procedure Act. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989). To this day, the Administrative Procedure Act shortcoming of the rule (i.e. the failure to subject the rule to notice and comment) remains and the rule is not applied within the geographic area of the Fourth

Circuit.[8] In fact, the reason why the Corps, in *Wilson*, relied upon the underlying regulation, 33 C.F.R. section 328.3(a)(3), rather than the "migratory bird rule" itself is because the rule is not enforced in the Fourth Circuit because of *Tabb Lakes*.[9]

The conflict between the Seventh and Ninth Circuits, on the one hand, and the Fourth Circuit, on the other, as to this important question should be resolved by this Court.

1. The Statutory Text

Neither the Corps nor EPA—nor, for that matter, any court—has ever maintained that the text of the CWA justifies the "migratory bird rule." The reason is that the words of the statute are restrictive, not open-ended, and do not support such a claim. The CWA expressly regulates the discharge of pollutants into "*navigable waters*" alone. 33 U.S.C. §§ 1311, 1342, 1344. Although that expression is later defined to mean "the waters of the United States" (33 U.S.C. § 1362(7)), and the Supreme Court has commented that this "makes it clear that the term 'navigable' as used in the Act is of limited import" (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)), as that Court impliedly recognized, this is far from altogether discarding the notion of navigability as the anchor for the legislation.

Indeed, the expression "waters of the United States," or a like term, had been used in legislation for more than a century to denote waters which, if not themselves navigable, were at least immediately connected to waterways useful for interstate or foreign commercial navigation.[10] Moreover, less than a

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[8] *See* Corps/EPA memo entitled "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (Jan. 29, 1990). A copy of that memorandum is attached hereto as Appendix A.

[9] Although the Corps and EPA in their January 24, 1990 memorandum promised to publish the "migratory bird rule" in accordance with the Administrative Procedure Act, such publication has never occurred.

[10] *See, e.g.*, Rivers & Harbors Act of 1894 § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895 § 2, 33 U.S.C. § 151; Rivers & Harbors Act of 1899 § 10,

decade before the 1972 enactment of the CWA, this Court observed that it is self-evident that the statutory expression "streams 'over which Congress has jurisdiction under its authority to regulate commerce'" reaches no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 97 (1965).

The CWA definition of navigable waters reflects a congressional intent to push back the *boundaries* of covered navigable waterways to include their non-navigable portions, their non-navigable tributaries, and their adjacent non-navigable wetlands. However, it does not allow the Corps or EPA, in their administration of the CWA, to ignore that the definition is of *navigable waters*, a term which simply cannot be stretched to embrace waters and wetlands that are themselves not navigable and have *no connection* to any navigable waterway.

If Congress had meant to throw overboard the concept of navigability as the constitutional premise for the legislation, it knew the formula. As long ago as the Federal Power Act of 1920, statutes had been written to reach activities "affecting" interstate or foreign commerce. *See* Federal Power Act § 23(b), 16 U.S.C. § 817, *construed in Federal Power Comm'n v. Union Electric Co.*, 381 U.S. at 93-99. Here, instead of asserting jurisdiction over all waters whose degradation would "affect" interstate commerce—a very broad category—Congress chose to limit itself to regulating discharges "in" "navigable waters." This is a critical distinction. *Cf. Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914).

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33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936 § 1, 33 U.S.C. § 701(a).

Discharges "in" or "into" navigable waters is confined geographically to what have been considered "federal" waters: a category of waters that have a distinct and well understood meaning. This is to be contrasted with the non-geographic and open ended concept of all waters that could "affect" interstate commerce.

There is good reason to construe the CWA as embracing only "federal" waters and their adjuncts. Federal legislation concerns itself with interstate navigable waterways, leaving local waters to state regulation. The fact that Congress relied upon specific Supreme Court precedents in defining the limits of the CWA (*see* n.12, *infra*) and the emphasis on *navigable* waters, leads to the conclusion that Congress believed it was exercising the federal power over water commerce—and nothing more. *This* is the power the legislators presumably wanted to take to *its* constitutional limit. There is not the remotest indication that they thought the "navigation" power would reach isolated non-navigable intrastate waters.

The fact is that the CWA on its face deals only with the waters whose pollution is federal business because they are closely related to interstate commerce. As in earlier legislation,[11] adjacent waters, including non-navigable tributaries and abutting wetlands, are included. But there is no ground for reading "waters of the United States" to encompass non-navigable waters or wetlands wholly isolated from interstate waterbodies and unconnected to the federal water system.

2. Legislative History

The oft-cited equation between the reach of the CWA and constitutional limits derives from a misreading of the Act's

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[11] *E.g.*, Act of June 29, 1888 § 1, 33 U.S.C. § 441 ("tributary waters" of New York Harbor); Rivers & Harbors Act of 1899 § 13, 33 U.S.C. § 407 ("any tributary of any navigable water"); Pub. L. 85-500, § 104, 33 U.S.C. § 610 ("navigable waters, tributary streams, connecting channels, and other allied waters"). *See also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-710 (1899).

legislative history. In truth, Congress never suggested that the CWA would go to the constitutional limit. What in fact was said was something very different: that the phrase "*navigable waters*" was to be given "the broadest possible constitutional interpretation." S. Conf. Rep. 1236, 92nd Cong. 2d Sess. 144 (1972); 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie); *see also Leslie Salt Co. v. Froehlke*, 578 F.2d at 755.

No doubt, Congress meant to embrace all waters that could be reached under its Commerce Clause *power to regulate water commerce*, i.e. navigable waters, actual and potential, together with their "adjuncts." But there is not the slightest hint that Congress meant to invoke *other* Commerce Clause powers—unrelated to water commerce—to regulate isolated non-navigable waters. It is significant that, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court eschewed the easy path to its result—that Congress meant to go to the constitutional limit—and, instead, parsed at some length the legislative history of both the 1972 statute and the 1977 amendments in arriving at the expressly limited conclusion that wetlands immediately adjacent to, and inundated by, a fully navigable waterway were within the ambit of the CWA. *See id.* at 124, 130-132, 135, 136-138.

The legislative history of the CWA fully confirms that navigability was the touchstone of coverage. It is true that Congress intended to define the covered waters "broadly," going beyond the "classical" or "traditional" tests followed under earlier water pollution control legislation. *E.g.*, 118 Cong. Rec. 33757 (1972). But this only meant including the non-navigable "portions" and "tributaries" of actually or potentially navigable watercourses—as the repeated invocation of cases so holding indicates. *E.g.*, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (1972) (statement of Senator Muskie).[12] Never

[12] The decisions of the Supreme Court referred to in the legislative history which were intended to reflect the limits of the CWA are *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427

was there any expression of intent to regulate waters that are not physically a part of or connected to navigable waters. From first to last, the preoccupation was with navigability, and the ultimate refusal to meaningfully define the term exhibits no more than a fear that any words used might be read too narrowly. It is quite unreal to suggest that, without saying so, those who struggled so long over the way to define navigability meant to cast aside the concept and reach any waters which could be linked with commerce in a wholly different way.

It is obvious that the drafters of the CWA never contemplated that it could be stretched to include isolated waters on the basis of the presence of migratory birds. In the many thousands of pages of legislative history leading to the enactment of the law in 1972 (and its revision in 1977), no one ever suggested such a ground for coverage. As we shall discuss, the idea was not thought of until Congressional oversight hearings in 1985.

Given the practical consequences of the many millions of acres of lands throughout the United States becoming subject to federal regulation under this rule, as well as the novelty of the migratory bird theory itself, it would be remarkable if this expansive theory of jurisdiction would have been accepted by all members of Congress without mention. In sum, the legislative history of the CWA undercuts the claim that isolated, non-navigable waters were ever intended to fall within the reach of the CWA, much less on the theory that their only connection with interstate commerce is the flight of migratory birds.

3. Administrative Construction

Cargill submits there is no room for reading into the CWA a license to regulate non-navigable isolated waters frequented by migratory birds. Such a radical extension of coverage is

(1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941).

well beyond any reasonable construction of the Act, and, accordingly, cannot be vindicated by invoking deference to the administrators' interpretation of the statute.[13] This view is confirmed by the failure of the implementing agencies (the Corps and the EPA) to "discover" the new basis for jurisdiction until more than thirteen years after the CWA was enacted. Under such circumstances, it is especially difficult to indulge any presumption in favor of administrative construction,[14] and strongly suggests, not legitimate interpretation, but creative law-making by an agency with no such delegated authority.

We are not dealing with a relatively inconsequential detail: predicating CWA jurisdiction over isolated waters on the presence of migratory birds brings tens of millions of acres under regulation for the first time, at least potentially banning all residential, agricultural, commercial or industrial use of the sites. This is not a matter that could have escaped the attention of the legislators and administrators for so long. The existence of such isolated wet areas—especially prairie potholes and other isolated freshwater wetlands—and their importance to migratory birds, was well-known, and had been the focus of special protective legislation, typically providing for the *purchase* of relevant sites or appropriate easements.[15]

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[13] *See Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990); *Sullivan v. Zebley*, 493 U.S. 521, 527 (1990); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 207, 212-213 (1988); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516-517 (1988); *Martin v. Refrigeration School*, 968 F.2d 3, 7-8 (9th Cir. 1992); *Arizona Electric Power Co-Op, Inc. v. United States*, 816 F.2d 1366, 1375-1376 (9th Cir. 1987). *See Chevron USA v. NRDC*, 467 U.S. 837, 842-844 (1984).

[14] *See Bowen v. Georgetown University Hosp.*, 488 U.S. at 211-213. *See also Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n.34 (1986); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

[15] Statutes enacted to this end include: Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755, 16 U.S.C. § 703, *et seq.*; Bear River Migratory Bird Refuge Act of Apr. 23, 1928, ch. 413, 45 Stat. 448, 16 U.S.C. § 690, *et seq.*; Migratory Bird Conservation Act of Feb. 18, 1929, ch. 3657, 45 Stat. 1222, 16 U.S.C. § 715, *et seq.*; Cheyenne Bottoms Migratory Bird Refuge Act of June 12, 1930, ch. 469, 46 Stat. 579, 16

In this setting, then, it is not possible to reasonably construe the 1985 decision to reach these areas under the CWA as merely the belated revelation of a previously unrecognized truth.

Also instructive is how the decision came to be made. The Corps had initially read the CWA as embracing no more than those navigable waters and their adjuncts that were subject to the federal navigational servitude.[16] Only under compulsion of a court decree in *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), did the Corps rewrite its regulations to reach any isolated waters. *See* 1975 Corps Regulations, 40 Fed. Reg. 31320, *et seq.* (1975) The new regulations barely survived Congressional scrutiny. *See Riverside*, 474 U.S. at 135-137. More to the point, there was as yet no suggestion that bird use alone would trigger "isolated waters" jurisdiction.

It was only in 1985, during hearings before a Senate Subcommittee, where the EPA, followed by the Corps, first suggested the "migratory bird rule." *See* "Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works," 99th Cong., 1st Sess. 168, 169-170, 189-190, 212 (1985). And then, the Corps

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U.S.C. § 691, *et seq.*; Migratory Bird Hunting Stamp Act of Mar. 16, 1934, ch. 71, 48 Stat. 451, 16 U.S.C. § 718, *et seq.*; Migratory Waterfowl & Other Wildlife Refuge in Cal. Act of May 18, 1948, ch. 303, 62 Stat. 238, 16 U.S.C. § 695, *et seq.*; Migratory Bird Hunting Stamp Act Amendments of Aug. 1, 1958, Pub. L. 85-585, 72 Stat. 486, 16 U.S.C. § 718(b) & (c); Wetlands Act of Oct. 4, 1961, Pub. L. 87-383, 75 Stat. 813, 165 U.S.C. § 7152k-3, *et seq.*; Endangered Species Act of Dec. 28, 1973, Pub. L. 93-205, 87 Stat. 884, 16 U.S.C. § 1531, *et seq.*; Wetlands Loan Extension Act of Feb. 17, 1976, Pub. L. 94-215, 90 Stat. 189, 16 U.S.C. § 715; Emergency Wetlands Resources Act of Nov. 10, 1986, Pub. L. 99-645, 100 Stat. 3582, 16 U.S.C. § 3901, *et seq.*

[16] *See* "Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation," 94th Cong., 1st Sess. 29 (1975). *See also id.* at 5, 6, 34.

adopted the "migratory bird rule" by a procedure that precluded public scrutiny, depriving the agency of the benefit of public comments. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989).[17] This is not the hallmark of a change of position that merits deference because it results from the "well-considered" judgment of an expert agency, carefully rethinking the import of the statute during "a detailed and comprehensive process," and altering its view based on its expertise and in light of its experience in administering the contested provision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-356 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

B. THE MIGRATORY BIRD RULE EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

It is settled that a court should avoid reaching any constitutional question if at all possible. Unless it is unambiguously clear that Congress has directed, or authorized, an agency to cross over into territory where serious doubts arise, the statute should be construed so as to make unnecessary a resolution of the constitutional issue. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 74, 78, 82 (1982); *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

It seems quite plain that the CWA reasonably could be read *not* to authorize the "migratory bird rule." This is the conclusion of the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which invalidated the very regulation (33 C.F.R. § 328.3(a)(3)) the migratory bird rule is said to "interpret."

To interpret the CWA as supporting the "migratory bird rule" is subject to two constitutional infirmities. The first,

[17] It has never been incorporated into a regulation—appearing only in the published preface to the Corps' 1986 regulations. *See* 51 Fed. Reg. 41217 (1986).

which we discuss now, is that the rule oversteps the boundaries of the Commerce Clause. The second, to be discussed in Section C, below, is the constitutional impropriety of a congressional delegation of power so wide and unconfined that it purports to authorize the agencies administering the law to extend the coverage of the statute well beyond anything contemplated by Congress.

Because the migratory birds covered by the rule expressly include species not covered by treaties (*see* 51 Fed. Reg. 41217 (1986), category (b)), the Commerce Clause is necessarily the constitutional power relevant here. Although some may argue that there are *no* limits to the reach of the Commerce Clause, provided only some "effect" on interstate or foreign commerce can be found—no matter how trivial or indirect—that is not the law. This was made clear by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). The true rule is that a "relatively trivial impact on commerce" will not serve as "an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 305 (Burger, C.J., concurring), 310-312 (Rehnquist, J., concurring) (1981). Accordingly, the first question here is whether the "migratory bird rule" regulates any activity that would have a "substantial" effect on interstate commerce. *See Maryland v. Wirtz*, 392 U.S. at 189.

As written and as applied, the rule requires no showing whatsoever that the presence of migratory birds on a site has attracted out-of-state human visitors—whether bird watchers or duck hunters. And, indeed, in the case of small "ponds" of no scenic value, used by very common varieties of birds, it is unlikely that the occasional presence of wildfowl will have any measurable effect on human travel interstate. For example, in Cargill's case now pending in the Ninth Circuit, the site in question is inaccessible to the public, including the Plaintiffs. Nor does the rule require that the migratory birds on which jurisdiction is predicated are species which are ever

bought and sold, whether for food or as pets or otherwise. *See Lopez*, 514 U.S. at 561 (observing statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the [activity sought to be regulated] affects interstate commerce").[18] Thus, the claim for a link with interstate commerce depends entirely on the movement of the birds themselves. We doubt that this can ever qualify as a "substantial" effect on interstate commerce.

The ultimate question is whether the self-determined flight of birds is "commerce" in the constitutional sense. If not, an activity that indirectly bears on the migration of birds does not, on that account, "affect interstate commerce" and cannot be regulated under the Commerce Clause. Certainly, common usage does not encompass an animal migration, independent of human forces—and, therefore, divorced from any "commercial" motive—as an aspect of "commerce."

It has been held that pursuant to its Commerce Clause power, Congress can ban the interstate transportation of protected bird parts (*Andrus v. Allard*, 444 U.S. 51 (1979)), and that state impediments to the interstate shipment of minnows are within the ambit of the clause. *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Maine v. Taylor*, 477 U.S. 131 (1986). But no Supreme Court decision goes so far as to suggest that fish swimming under their own power across a

[18] While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," this Court has said that as part of its "independent evaluation of constitutionality under the Commerce Clause [it] of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Lopez*, 514 U.S. at 562-563. As was the case in *Lopez*, such findings are lacking here. Neither the text of the CWA (*see* Section A.1, *supra*), nor its relevant legislative history (*see* Section A.2, *supra*), contains any mention of the purported effects on interstate commerce claimed by the Corps to support the "migratory bird rule." *Compare National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1050-1051, 1056-1057 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (*citing* legislative and congressional committee findings of effects on interstate commerce in upholding against *Lopez* Commerce Clause challenge application of ESA to fly species with habitat located entirely within an 8-mile radius in California).

state boundary, or birds in free flight crossing an interstate line, are engaged in "commerce between the States." Plainly, neither *Andrus v. Allard* nor *Hughes v. Oklahoma*, involving the human-initiated transportation of captive species, speaks to this question.[19] Nor does *Missouri v. Holland*, 252 U.S. 416 (1920), which relied entirely on the Treaty Clause to vindicate the Migratory Bird Treaty Act of 1918. *See id.* at 432-435. The total absence of any Supreme Court precedent is attested by remarks from the Court during the oral argument of the *Riverside* case.[20]

[19] The United States, in the *Leslie Salt* cases, has invoked a passage in *Allard*, treating as "clearly flawed" the "assumption that the national commerce power does not reach migrating wildlife." *Allard*, 444 U.S. at 63 n.19. But that was said in reference to the sale of such birds—obviously not the case here.

It is worth noting that in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), the Supreme Court did not speak of fish migrating across state lines as an aspect of "interstate commerce," but stressed, instead, the "movement of vessels from one State to another in search of fish, and back again to processing plants" as an "activity which Congress could conclude affects interstate commerce." *Id.* at 282.

[20] The dialogue was as follows (Transcript of Oral Argument in Supreme Court No. 84-701):

QUESTION [by Justice White]: But it would be your view that an isolated wetland that provided refuge for birds would be enough for Corps of Engineers jurisdiction?

ANSWER [by Ms. Oberly, Government Counsel]: If they were migratory birds, yes.

Q: If there was an aerial connection, as you say.

A: Yes.

(General laughter.)

Q: Is the movement of birds interstate commerce?

A: It can — Yes.

Q: What case do you rely on?

A: Missouri versus Holland would be an example.

Q: That was a treaty power case.

A: It is a treaty power case, but I think it demonstrates the importance—

Q: Well, it demonstrates the treaty power.

A: North Dakota—United States versus North Dakota. I may have it backwards. I think it is North Dakota versus United States, which dealt with prairie potholes in North Dakota as important breeding

Justice Thomas, in his dissent to the denial of Cargill's petition to this Court following the *Leslie II* decision, aptly opined that "the basis asserted [the "migratory bird rule"] to create federal jurisdiction over Petitioners' land in this case seems to me to be more far-fetched than that offered, and rejected, in *Lopez*." *Cargill, Inc. v. United States*, 516 U.S. 955, 957-958 (1995).

C. THE MIGRATORY BIRD RULE IS UNCONSTITUTIONAL AS RESULTING FROM AN EXCESSIVE DELEGATION OF LEGISLATIVE POWER

Neither the Government nor the courts have ever straightforwardly asserted that the Congress that enacted the CWA in 1972 intended to reach isolated waters and wetlands used by migratory birds. In light of the statutory text and the legislative history, that would be a most difficult proposition to maintain. Instead, the argument seems to be that Congress wholly abdicated its defining function, eschewing any decision as to what effects on interstate commerce would justify federal regulation of local waters, and left the administering agencies entirely free to search out, from time to time, the constitutional limits of geographic jurisdiction, relying on the judiciary, if and when called upon, to curb any overstepping of the Commerce Clause. To say the least, there

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grounds for migratory waterfowl. That was a statutory construction case. But I think the Court has recognized in quite a few cases that—

Q: That the migration of birds is interstate commerce?

(General laughter.)

A: That it can be. If—

Q: Well, what—in what cases—

A: Duck hunters.

Q: In what cases have we recognized that?

A: I may be unable to give you a case, Your Honor, but I would suggest that duck hunters, interstate travelers who go to wildlife refuges to view ducks, migratory ducks who come from out of state, all of that together combines to make not just the birds alone but the viewing of the birds and —

Q: It has an effect.

A: It has an effect sufficient to constitute a connection with interstate commerce.

are substantial problems with this scenario. In fact, in its appellate briefs in the *Tabb Lakes* case, the United States was at pains to assert—correctly, in our view—that the CWA grants no quasi-legislative power to the Corps, which would permit the agency, through "substantive" regulations, to expand the statutory coverage. *See* Brief of the United States Appellant at 21-23, and Reply Brief for the United States at 2, 8-10, *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866.

Even assuming Congress itself might have directly enacted the "migratory bird rule," there must be a serious question whether it could accomplish the same result by a sweeping delegation of legislative power "not canalized within banks that keep it from overflowing," but "unconfined and vagrant." *See Schechter v. United States*, 295 U.S. 495, 551 (1935) (Cordozo, J., concurring). There are surely some limits on the practice of resolving legislative differences, or drafting difficulties, by leaving it to the administrators to make all the hard choices. At least, it seems excessive to authorize an agency to do anything that will withstand constitutional scrutiny--without even remotely suggesting what those boundaries might be. *See* L. Tribe, *American Constitutional Law*, 362-368, 1677-1682 (2d ed. 1988). Here, we do not have an expression by Congress in the statute itself that invests the implementing agencies with the authority to expand their jurisdiction to the constitutional limit. Nor do we have the benefit of any criteria or standards that would guide the agencies in that endeavor. Such a total absence of Congressional delegation and guidance surely raises serious and, Cargill submits, fatal constitutional infirmities.

The CWA contains even less legislative guidance to the implementing agencies with respect to defining the reach of "waters of the United States" than the Clean Air Act provisions found to constitute an impermissible delegation in *American Trucking Association, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *order on reh'g* 195 F.3d 4 (D.C. Cir. 1999). It is worthy of note that the Government, in its Petition to this

Court for review of *American Trucking* (*see* Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in *Browner v. American Trucking Association, Inc.*, No. 99-1257 (Jan. 2000) at 14), relies upon the availability of the Administrative Procedure Act rulemaking process to save portions of the Clean Air Act from being struck down as an impermissible delegation to EPA. However, here, the "migratory bird rule"—despite its moniker—is not the product of the notice-and-comment rulemaking prescribed by the Administrative Procedure Act (*see* 5 U.S.C. § 553) or by rulemaking procedures specified by the CWA. Consequently, even this theory cannot save the "migratory bird rule."

There is another concern. If the Commerce Clause properly can be invoked to reach isolated waters frequented by migratory birds, it must be by taking the commerce power to its outer limit. That might be justified in deference to the judgment of Congress, whose findings with respect to effect on interstate commerce are entitled to respect. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 303-305 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276-277; *Metro Broadcasting v. FCC*, 497 U.S. 547, 563-566 & nn.11-13 (1990). The Constitution entrusts the legislative branch with the task of assessing the need for national regulations of "commerce . . . among the several States." U.S. Const. art. I, § 8, ch. 3. But it does not follow that an administrative agency, acting without an explicit Congressional mandate, is equally free to exercise constitutional power to the same boundary.

Whatever deference is due Congress' constitutional determination, based on full legislative consideration, no such deference operates in favor of implementing agencies whose "expertise" and practical experience may, under some circumstances, justify deference to their reading of statutes, but not the Constitution. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-104, 114-116 (1976); *Greene v. McElroy*,

360 U.S. 474, 507 (1959). *Cf. Flores v. Meese*, 942 F.2d 1352, 1362 (9th Cir. 1991); *Ayala-Chavez v. INS*, 945 F.2d 288, 294 (9th Cir. 1991). Without the benefit of such a presumption, we submit the "migratory bird rule" cannot pass the constitutional test.

CONCLUSION

The decision of the Court of Appeals should be reversed.

DATED: March 2000

Respectfully submitted,

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DEPARTMENT OF THE ARMY
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16 JAN 1990

REPLY TO ATTENTION OF:

CECW-OR

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

United States Environmental Protection Agency

United States Department of the Army

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes* v. *United States*

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes* v. *United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this

interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes*, and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to the procedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters "...prairie potholes, wet meadows, [and] playa lakes...", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated

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waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

JOHN P. ELMORE — Date: 1/24/90
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental Protection Agency:

DAVID G. DAVIS — Date: 1-19-90
Director
Office of Wetlands Protection